D. Orndorf's Second Claim for Disability Benefits Related to Back, Ankle and Neck Pain as Well as Hypertension

On June 23, 1998, Orndorf told one of Paul Revere's field representatives that he believed his chief disabling condition was a long-standing back problem along with an arthritic ankle, hypertension, high blood pressure, and stress, and that he anticipated needing disability benefits long after the sixty-month term for benefits associated with his drug-related disability expired in June 2000. Orndorf also indicated that he had no immediate plans to seek employment. The field representative provided the following account of Orndorf's own assessment of his back pain:

> The insured relates that he can sit for approximately two to thirty minutes and then must change positions to temporarily relieve his pain. He relates that he has constant back pain and that he must lie down four to five times per day in a prone position to again temporarily relieve the pain. He relates that he can stand for approximately fifteen minutes before the pain becomes too great. Past treatment for his back consists of epidural injections, physical therapy, massage, and a tens unit which he currently still uses···· Mr. Orndorf explained that his back condition is a big reason why he is always in a bad mood and as he is in constant pain, it makes it difficult for him to concentrate at times. When he does lie down on his back, he must lay there for approximately forty-five minutes to one hour···· Current treatment consists of the tens unit which he uses at night and a hot pad. His previous house had a hot tub which would help some, but at this time he does not have access to one····
>
> Mr. Orndorf relates that his daily restrictions

> have to do with his back and they include sitting for no more than twenty to thirty minutes at a time without changing positions and standing for no more than fifteen minutes at a time without changing positions. He relates that he is able to drive short distances and that going up and down stairs is restricted due to his hypertension and stress. Mr. Orndorf relates that he is unable to play golf as he used to and unable to lift weights as he used to due to his back condition···· The insured stated that sleeping is a problem for him due to the pain and he will take naps throughout the day.
>
> ··· The only outdoor activity that our insured would admit to is taking short walks. He stated that the walking does cause a lot of pain, but he is in pain anyway so why not walk and get out of the house once in a while. Mr. Orndorf relates that surgery has been discussed in the past for his back, but that a laminectomy would cause his L4 and L5 vertebrae to destabilize. He was told that a laminectomy would just cause more aggravation to his condition.

AR at 00549-00554.

Paul Revere then commenced an investigation of Orndorf's medical records in order to determine whether any physical limitations warranted new disability benefits.

1. Treatment for Back Pain

The records revealed that Orndorf first sought treatment for back pain in 1976; at that time he reported having back aches as early as 1971. In 1979, after jumping from a moving car, Orndorf sought treatment for severe pain in his lower back as well as his right knee and foot. The

diagnosis at that time was a fifty percent loss of disk space between L4 and L5, but there is no record of treatment following that diagnosis.

In 1992, after weightlifting as much as 350 to 400 pounds, Orndorf again complained to a doctor of low back pain; again there is no record of treatment following his complaint. On December 29, 1993, an MRI on Orndorf's lumbosacral spine (lower back) revealed the following: "There is a central and left side disc herniation at the L4-L5 level. There are degenerative disc changes of this disc with a decrease in the disc space height and some loss of signal intensity of the disc." AR at 00826. On January 7, 1994, Orndorf again complained to a doctor of chronic, long-standing lower back pain and was given the following assessment based on a review of the recent MRI: "Advanced degenerative changes with small disc fragment at 4-5 interval with secondary changes at the 3-4 interval." AR at 00047-00048. The doctor then recommended a strong rehabilitative program, a series of epidural injections over one to two months, anti-inflammatory medication at the end of the day, and reevaluation in six to eight months.

Orndorf next was seen for back pain on March 8, 1995. At that time he reported a twenty-year history of low back pain and herniated disks at L4-L5, pain radiating through his buttocks and legs to his knees, aggravation of pain by standing or walking, and difficulty sleeping. He was offered further orthopedic, rehabilitation, and medical evaluations, but he declined. Shortly thereafter Orndorf was hospitalized for his drug overdose, at which time his back pain was described as under control through stretching exercises and Tylenol.

On August 29, 1995, Orndorf was seen for ankle pain and x-rays were taken which revealed evidence of old trauma but no new injuries or degenerative arthritis.

On June 28, 1996, Orndorf was involved in a car accident and was taken to the hospital for evaluation. He complained of low back and neck pain resulting from the accident, but did not report a history of back pain. X-rays of his lumbar spine revealed "no acute bone injury" but did indicate "[c]onsiderable degenerative changes at L4-5, possibly with associated spinal stenosis or disc herniation, ··· though they are very unlikely to be related to the current trauma." AR 00940.

On September 9, 1996, Orndorf went to the VA Medical Center in Northampton complaining of depression and worsening back pain. He reported that his back pain prohibited him from standing for more than half an hour at a time, that a hot tub provided some relief, and that he thought he needed a CT scan. He could not wait to been seen by a doctor, however, and returned the next day, at which point he reported suffering back pain for many years and stated that at some point he had been treated with three epidurals. Orndorf was provisionally diagnosed with a herniated disc.

On September 16, 1996, he was evaluated by a neurologist, who noted Orndorf's long history of lower back pain. The neurologist's report indicated chronic low back pain with pain and numbness radiating down the left leg to his left foot. The neurologist also indicated that Orndorf did not want surgery, and referred him to Physical Medicine and Rehabilitation where he was seen the next day (September 17).

At that time, Orndorf again reported chronic low back pain since 1975, which had been treated in the past with epidurals, deep heat, and stretching exercises. He indicated current pain and some numbness radiating down his left leg,

and received several recommendations: weight reduction including consultation with a diet clinic (Orndorf was mildly obese); instruction in proper stretching techniques; and trial of a TENS unit for four weeks. In follow-up visits over the next few weeks, Orndorf reported that the TENS unit was working.

On October 31, 1996, when he was seen for an epidural block, Orndorf reported a long history of back pain. Orndorf also reported receiving steroid epidurals in the past which resulted in two to three months of relief as well as some recent pain relief from use of the TENS unit and Yoga. On November 4, 1996, Orndorf reported feeling really good following the last session, but indicated that the back pain had returned the day before. Orndorf expressed his hope that the pain would be assuaged by the recent epidural, and during a check up the following day Orndorf did report good results from the epidural.

Orndorf did not report any further back pain for over a year, until December 4, 1997. He received physical therapy for his back pain on December 5, 8, 11, and 15, but failed to show up for appointments on December 17, 19, and 22, and so was discharged.

As part of an examination by an orthopedist on January 9, 1997, Orndorf filled out a lengthy Patient Questionnaire. He reported the following: current pain in his lower back and both legs, along with numbness in his thighs and weakness in his knees; a history of "off and on" back pain since 1976; improvement in his condition with treatment including pain medicine, arthritis medicine, physical therapy, heating pad, TENS unit, and cortisone injection; more frequent and severe episodes of back pain exaggerated by standing for a long time, walking, and generally being active, and eased by lying down (but not by

sitting); being able to walk several blocks and stand or sit in one position for half an hour; that his occupation was "writer," a job that required sitting for prolonged periods of time; and that he was currently on disability for his back problem.

The orthopedist also filled out an evaluation, in which he indicated decreased disk space at L4-5 since 1979 and symptoms of disk degeneration. The orthopedist also noted that the previous epidurals had resulted in pain relief for between two months and a year, with the pain returning gradually. He recommended appropriate exercises and more epidural injections if the pain persisted.

Over a year and a half later, on July 27, 1998, Orndorf again complained to a doctor of low back pain. At that time, the treatment plan included continued stretching exercises and referral to a pain clinic for an epidural block.

On August 28, 1998, Orndorf's attending physician, Dr. Hashimi, indicated that Orndorf suffered from a psychiatric problem, bipolar disorder, and was permanently disabled-indeed, had been permanently disabled since July 13, 1979. Orndorf reported at that time that the only activity he engaged in was sleeping.

On June 25, 1999, Dr. Richard N. Norris assessed Orndorf's chief complaint of low back pain with tightness in his legs and occasional shooting pains. Orndorf related that his back pain began in 1976, a few months after he was in a car accident. His history, and subsequent examinations, including a 1993 MRI, showed disc herniation and severe narrowing of the disc space at L4-5. Orndorf also told the doctor that he had six or seven epidurals over the past several years (each bringing three or four months of pain relief), a lot of physical therapy (most recently six months before),

and that he exercised by riding a bicycle one or two times per week for two to three hours at a time. The doctor then related his impression of Orndorf's back pain: "severe discogenic disease at L4-5 ··· most likely related to the motor vehicle accident in 1976." AR at 00828. He recommended "a course of lumbar stabilization" exercises and "some repeat epidurals." AR at 00829.

2. Orndorf's Capacity to Work

On November 30, 1995, following Paul Revere's approval of Orndorf's first claim for disability benefits, Dr. Stalman again filled out an Attending Physician's Statement indicating that Orndorf "has the disease of addiction for the rest of his life" and could never work again "as a perfusionist." AR at 00112. In a phone conversation on December 28, 1995, Orndorf informed Paul Revere of his interest in teaching, doing creative writing, or being a social worker, and also indicated a willingness to work as a laborer in a limited capacity.

In February of 1996, Orndorf agreed to consider the vocational rehabilitation services offered by Paul Revere, and on April 18, 1997 he met with Courtney Olds, a rehabilitation consultant who then completed an Initial Vocational Evaluation. Olds indicated that Orndorf professed an interest in making a living as a creative writer, but she suggested that he consider something more practical such as teaching, sales work, human services, social work, or drug and alcohol counseling.

Orndorf also engaged in regular psychotherapy sessions from November 14, 1996 until April 30, 1998. In a session on May 1, 1997, Orndorf stated that he had decided to try a part-time computer job but was concerned about his ability to follow through. In his next session (on May 15)

Orndorf and the therapist discussed his "employment impotence." AR at 00175. Later in the May 15 session Orndorf "discussed the pros and cons of re-entering the work force versus becoming self-employed in his current hobbies, i.e. computers and writing." AR at 00175. On May 22 he again expressed "some interest in developing his computer skills, writing skills, and computer performance art craft" but exhibited no intention to follow through on this interest. AR at 00174. On May 29, the therapist reported that Orndorf made "clear that he enjoys being creative and working on [the] Internet and creating home pages and writing and so on. He accepts recommendations to pursue his creative skills and he intends to join workshops and writing groups." AR at 00168. In a session on November 6, 1997, Orndorf reported becoming heavily involved in Alcoholics Anonymous, including sponsoring three different people, in order to keep himself busy. In a session on March 12, 1998, Orndorf was still undecided about "returning to work as a perfusionist versus becoming a professional writer," and at his session on April 9, Orndorf was "struggling with some work issues as he starts to cope with the idea of his insurance getting cut off eventually." AR at 00353, 00350. In a session on April 30, 1998, Orndorf reported that "he has initiated some job searches (private sector, working for himself or his friend) and he has initiated some support for voc[ational] rehab[ilitation] via Mass Rehab Commission." AR at 00345.

3. Paul Revere's Conclusion

In January, 1999, at Paul Revere's request, a nurse consultant reviewed Orndorf's medical file (essentially the same information included in the Record and recited above) and, citing discrepancies in his history of limitations and, in particular, a long bike ride Orndorf reportedly took in June 1998, determined that his low back pain was not a "physical

impairment ··· which would preclude [Orndorf] from performing the duties of his or a similar occupation." AR at 00617. Orndorf's occupation was listed as perfusionist. The nurse consultant noted her conclusion that Orndorf's ability to return to work depended on his psychological condition more than any back problem.

By letter on December 21, 1999, Paul Revere notified Orndorf of its determination that his back pain was not a disabling condition sufficient to preclude him "from performing the duties of [his] job or one similar in nature." AR at 00687. Paul Revere concluded that Orndorf's "only disabling condition has been depression and substance abuse," and that the sixty-month benefit period for such a disability pursuant to the Policy would terminate on June 27, 2000. AR at 00687. Paul Revere also advised Orndorf of his right to appeal its decision.

E. Orndorf's Appeals

Orndorf twice appealed to Paul Revere for reconsideration, and twice Paul Revere denied his appeal.

Orndorf lodged his first appeal by letter that Paul Revere received on March 21, 2000. He recited his own assessment of his condition in support of his appeal:

> I have L4, 4, 5 disc disease. I have received 7 epidurals, 2 in 1998. I have a tens unit for pain. There are stenotic changes in my spine. My right ankle is arthritic. As a result of the above I need to lay down 3-5 times a day for pain relief. With these facts I am hard pressed to imagine what meaningful work I might be able to do.

AR at 00696. Upon Paul Revere's request, Orndorf also submitted a few additional medical reports to support his appeal. On March 8, 2000, a CT of Orndorf's lumbar spine was performed revealing "moderate degenerative disc disease [at] L4-5 causing mild central spinal stenosis." AR at 00708. On May 12, 2000, an examination of Orndorf's cervical spine revealed "mild cervical spondylosis at the C5-C6 level." AR at 00709.

Paul Revere again undertook its own examination of medical records not previously reviewed to determine whether Orndorf's claim for disability benefits because of his back condition should be approved. Another nurse consultant reviewed six records: a February 1, 1999 medical review by Dr. Bianchi; an August 31, 2000 summary of treatment Orndorf had received for back pain; a November 1, 1997 letter from Dr. Rund; an undated functional capacity form completed by Dr. Mark Gilbert; a March 8, 2000 report of a lumbar spine CT; and X-rays taken on May 12, 2000. She reached a provisional conclusion that Orndorf was not physically impaired in a way that precluded his performing the duties of his occupation (identified as "perfusionist"). However, the nurse indicated that additional information was needed in order to make a final determination of Orndorf's claimed disability.

On October 3, 2000, Orndorf forwarded to Paul Revere a letter from Dr. Mark Gilbert, his attending physician, dated September 12, 2000. In that letter, Dr. Gilbert stated:

> Jacob Orndorff is a 45 year-old man disabled because of back pain. He first injured his back in 1976. Since then he has seen a variety of specialists and has had a variety of treatments for progressive incapacitating back pain. At this time, he says that he cannot stand

> for more than a few minutes, cannot sit for over half an hour, and has to lie down several times during the day because of pain. [An] MRI done in 1993 shows central and left-sided disc herniation with prominent degenerative changes at the L4-L5 level. He currently is 40% service connected for back pain and says that he is receiving Social Security disability. Because of this, I consider him disabled for sustained work.

AR at 00717.

By letter dated October 10, 2000, Paul Revere acknowledged receipt of Dr. Gilbert's September 12 letter, but also indicated that Orndorf would need to provide additional information regarding his physical condition, including "reports of your last examination from the report dated of your illness and updated physical examinations," by October 31, 2000. AR at 00719. That deadline passed, and the next correspondence was a phone call on June 4, 2001 from Orndorf's attorney to Paul Revere indicating his desire to appeal the denial of benefits related to a physical disability. Paul Revere subsequently agreed to grant an extension until August 6, 2001, to submit additional medical information.

On August 2, 2001, Orndorf's counsel submitted a letter reciting Orndorf's longstanding history of back pain as well as the Department of Veterans Affairs' conclusion that Orndorf was 100% disabled. The VA's report, dated December 5, 2000, estimated that Orndorf was 60% disabled as a result of his hypertension and 20% disabled as a result of a past ankle fracture, but was entitled to VA benefits as if he were 100% disabled because his "service connected conditions cause [him] to be unable to work." AR at 00765. With regard to Orndorf's ankle, the VA determined that pain limited his capacity to stand and walk, as well as his range of

motion. The diagnosis was of degenerative osteoarthritis. The VA report made no mention of any disabling back pain.

On August 14, 2001, Paul Revere sought a clinical review by a physician of Orndorf's file, and Dr. Steven J. Feagin issued his report on August 22, 2001. Doctor Feagin reviewed three volumes of documentation relating to Orndorf's medical history (largely as recounted above), and reached the following five conclusions regarding Orndorf's possible impairments:

> a) Primary psychiatric impairment at the date of disability with persistence demonstrated through much of the claim period without adequate objective documentation of persistence to or beyond the 12/21/99 determination letter.
>
> b) No objective basis for hypertensive impairment producing limitations or necessitating restrictions at or below a high-level medium workload.
>
> c) Degenerative disc disease of the lumbar spine with intermittent symptomatic exacerbations without evidence of continuous or persistent ongoing impairment through the life of the claim, at or about the 12/21/99 determination letter, or subsequently.
>
> d) Post-traumatic ankle pathology without objectively demonstrated standing or ambulatory impairment during the course of the claim beyond transiently associated with the 11/99 sprain and specifically without evidence of continued or persistent impairment from 12/21/99 determination letter up to the 5/3/00 examination.

e) No objective evidence of continued or persistent impairment producing limitations or necessitating restrictions from the claimant's maxillary sinusitis and cervical spine complaints.

AR at 00760.

In sum, Dr. Feagin concluded that Orndorf's psychiatric condition presented an impairment, but that his other physical conditions did not. And as a result, by letter dated August 23, 2001, Paul Revere advised Orndorf's counsel that "we have determined that he is not eligible for additional Long-Term Disability benefits" because "there was no basis for hypertensive impairment and no evidence of persistent impairment producing limitations or necessitating restrictions from Mr. Orndorf's maxillary sinusitis and cervical spine complaints." AR at 00758.

Orndorf's counsel immediately requested another appeal, and Paul Revere undertook another review of Orndorf's file. By letter dated October 18, 2001, which explicitly recited Dr. Feagin's conclusions, Paul Revere again informed Orndorf's counsel that it was denying his claim for Long-Term Disability benefits because Orndorf was not disabled pursuant to the Policy.

On October 22, 2001, Paul Revere received a letter from Orndorf's counsel dated October 12, 2001. Included with this letter were additional medical records regarding Orndorf's claimed disabilities. These additional records included three separate echocardiogram reports dated March 19, 1992, March 4, 1996, and August 25, 2000, and several diagnostic imaging reports concerning Orndorf's right ankle (May 4, 2000), both knees (May 4, 2000), and his lumbosacral spine (December 29, 1993, June 28, 1996, and

March 9, 2000). Doctor Feagin reviewed these additional records but did not alter his conclusions.

By letter dated January 10, 2002, Paul Revere informed Orndorf's counsel that the additional medical records did not change its conclusion of October 18, 2001, to wit, Orndorf was not disabled pursuant to the Policy and so his claim for Long-Term Disability benefits should be denied.

F. Orndorf Files Suit

Following Paul Revere's January 10, 2002 denial of his appeal, Orndorf commenced this lawsuit. His Second Amended Complaint contains two counts: first, that Paul Revere violated ERISA by failing to pay him disability benefits for physical limitations related to his back, ankle, and hypertension; and second, that Paul Revere's decision to terminate his benefits was arbitrary, capricious, and in breach of Paul Revere's duty of good faith and its fiduciary duty. Paul Revere denies that Orndorf is entitled to any further benefits pursuant to the Policy. Both parties have filed motions for summary judgment, and Paul Revere has filed two motions to strike. As noted above, a hearing was held before Judge Freedman on July 11, 2003, and the motions were taken under advisement. This case was reassigned to me on September 9, 2003.

III. STANDARD OF REVIEW

The Policy at issue in this case does not include specific language giving Paul Revere the right to determine eligibility for benefits, and so Paul Revere's out-of-court decision is subject to *de novo* (but not plenary) review. See Recupero v. New England Tel. Co., 118 F.3d 820, 827 (1st Cir. 1997); Allen v. Adage, Inc., 967 F.2d 695, 697 (1st Cir.

1992). Being de novo, "the standard of judicial review of the decision...is to some extent deferential in the sense that the reviewing court is not to set aside a factual finding of historical fact for which the record on which the decision was made contained adequate support." Recupero, 118 F.3d at 830. Thus, the insured bears the burden of showing that his claim for benefits should have been allowed. See Terry v. Bayer, 145 F.3d 28, 34 (1st Cir. 1998): Cleary v. Knapp Shoes, Inc., 924 F. Aupp. 309, 315 (D. Mass. 1996), citing GRE Ins. Group v. Metro. Boston Hous P'ship, Inc., 61 F.3d 79, 81 (1st Cir. 1995).

IV. DISCUSSION

As an initial matter, no evidence in the Record indicates that Paul Revere failed to pay Orndorf the full amount of the benefits owed to him as a result of his initial disability claim based on drug dependency. Following Orndorf's drug overdose and hospitalization in the Spring of 1995, Paul Revere approved his claim for disability benefits related to drug dependency. While it is undisputed that his drug dependency will be a lifelong condition and will prevent Orndorf from ever returning to his occupation as a perfusionist, it is equally undisputed that the Policy explicitly provided for no more than sixty months of benefits in case of a disability caused by a psychiatric disorder, alcoholism, or drug abuse. That sixty-month period began to run when, on August 24, 1995, Paul Revere approved Orndorf's claim for benefits related to his drug dependency retroactive to June 26, 1995. At that time Paul Revere advised Orndorf that the benefits would expire on June 26, 2000, sixty months from June 26, 1995. Paul Revere subsequently acknowledged this obligation on several occasions, and the Record contains no evidence of a failure to make payments sufficient to satisfy it. Thus, there is no merit to Orndorf's claim that Paul Revere's decision to

"terminate" his benefits was arbitrary, capricious, and in breach of a duty of good faith and a fiduciary duty.

Orndorf's remaining legal claim derives from his contention that Paul Revere unlawfully denied his claim for Long-Term Disability Benefits owing to physical limitations related to back, ankle, and neck pain as well as hypertension. With respect to each possible disabling physical limitation, that proposition collapses under the weight of the Record.

A. Orndorf's Allegedly Disabling Back Pain

Orndorf first experienced back pain in the early 1970s and has characterized it as "off and on" since then. He first sought treatment in 1976 and received more treatment in 1978 and 1979, but did not seek treatment for back pain again until 1992. In December 1993, an MRI of Orndorf's lumbar spine revealed degenerative disc changes at the L4-5 level with decreased disc space and some loss of signal intensity. He sought treatment for back pain intermittently from 1994 through 2000. More specifically, and read most generously in favor of Orndorf, the Record indicates that Orndorf was evaluated and/or treated for some degree of low back pain on the following dates: January 7, 1994; March 8, 1995; June 28, 1996; September 9, 16, and 17, 1996; October 31, 1996; November 4, 1996; December 4, 5, 8, 11, and 15, 1997; January 9, 1997; November 1, 1997; July 27, 1998; August 28, 1998; February 1, 1999; June 25, 1999; March 8 and 9, 2000; and May 12, 2000. The extent and substance of Orndorf's treatment on these dates is discussed above.

Despite this history of "off and on" back pain, Orndorf did not file a claim for disability benefits related to his back pain until 1998. Throughout most of that period,

from the time he first felt back pain in the early 1970s until the Spring of 1995 when he began receiving disability benefits for his drug dependency, Orndorf was either regularly employed or in school. At no point prior to June 23, 1998 was Orndorf's back pain substantial or sustained enough that he sought disability benefits.

Even after Orndorf began receiving disability benefits in 1995 and stopped working as a perfusionist, he continued to express an interest in work that required some degree of sitting or standing or physical activity. On December 28, 1995, Orndorf told Paul Revere that he was interested in teaching, creative writing, and social work, and also that he was even willing to work as a physical laborer in short stints. In several psychotherapy sessions from November 14, 1996 through April 30, 1998, Orndorf discussed his inclination to return to the workforce in some capacity, describing his main interests as working with computers and creative writing. In fact, Orndorf did work on computers as a hobby and did write some poetry from 1995 through at least 1998, activities that required some periods of sitting and/or standing. And even as late as March 12, 1998, Orndorf was actively considering returning to work as a perfusionist.

Moreover, Orndorf did not suffer any particular trauma that would have exacerbated his long standing back pain immediately prior to June 23, 1998, the date when he first indicated to Paul Revere his intention to seek disability benefits related to his back pain. At that time, in fact, Orndorf lived in a second story walk-up apartment, had recently been on bicycle trips, and was engaged in other physical activities. One year later, on June 25, 1999, Orndorf reported that "for exercise he rides a bicycle one or two times per week." AR at 00828.

The Record includes differing opinions of medical experts as to whether Orndorf's back pain physically limited his capacity to work as a perfusionist. Orndorf relies solely on the assessment of Dr. Gilbert and the VA report,[3] while Paul Revere relies on its own experts, including Dr. Feagin, who evaluated Orndorf's medical history. As described thoroughly above, the conclusions of Paul Revere's experts are adequately supported by the Record. The mere fact that Dr. Gilbert reached different conclusions is not a sufficient basis to challenge Paul Revere's well supported decision to deny Orndorf's claim for disability benefits related to back pain.

B. Orndorf's Allegedly Disabling Ankle Pain, Neck Pain, and Hypertension

Though ultimately unpersuasive, Orndorf's claim for disability benefits as a result of back pain is at least colorable. His other claims for disability benefits related to ankle pain, neck pain, and hypertension are entirely meritless. The Record contains scant support for such claimed disabilities.

---

[3] Along with the memorandum supporting his motion for summary judgment, Orndorf included a lengthy Employability and Earning Capacity Evaluation (the "Evaluation") prepared on January 20, 2003 by Edmond Provder, a certified rehabilitation counselor at Occupational Assessment Services, Inc. The Evaluation was submitted under the purported aegis of a December 30, 2002 court order allowing limited supplementation of the record. However, the court order allowed for supplementation only for the purpose of clarifying the duties of Orndorf's occupation; it did not allow for supplementation with more medical records of a disability. Since the Evaluation steps well beyond the limited bounds established by the court order, Paul Revere's Motion to Strike the Evaluation (Docket No. 40) is hereby ALLOWED except as to that limited portion of the Evaluation that is relevant to clarifying the duties of Orndorf's occupation.

Orndorf broke his right ankle in 1974 while serving in the Air Force, but worked at various jobs for the next twenty years before going on disability for his drug dependency. In 1999, Orndorf sprained the same ankle, but was physically impaired only briefly. He was diagnosed with arthritis in his ankle, but the Record is entirely devoid of any indication how this arthritis is debilitating or disabling in a manner that merits Long Term Disability benefits pursuant to the Policy.

Orndorf suffered a cervical fracture in 1978 but, like his old ankle injury, was unimpeded in his work for nearly twenty years. He suffered cervical strain associated with an automobile accident in June 1996, but there is no evidence of any persistent pain or impairment beyond mild cervical spondylosis at the C 5-6 level that was detected on May 12, 2000. While the Record is clear that Orndorf sought at least some medical treatment for his back pain, there is no evidence that he ever sought anything more than temporary treatment for transient neck pain.

Similarly, the Record contains occasional references to Orndorf's hypertension, but there is absolutely no indication that it impairs his capacity to work in such a way that warrants disability benefits.

In contrast to the extensive medical records related to his back pain, the VA report dated December 5, 2000 provides the only substantive support for Orndorf's claimed disabilities related to ankle pain, neck pain, or hypertension. The VA report is not binding on Paul Revere or this court, and given the dearth of other supporting evidence in the Record, Paul Revere's decision to deny Orndorf's claim for benefits based on ankle pain, neck pain, and hypertension was well supported.

V. CONCLUSION

For the reasons set forth above, plaintiff's Motion for Summary Judgment (Docket No. 34) is DENIED, defendant's Motion for Summary Judgment (Docket No. 36) is ALLOWED, defendant's first Motion to Strike (Docket No. 40) is ALLOWED, except as to that limited portion of the Evaluation that is relevant to clarifying the duties of Orndorf's occupation, and defendant's second Motion to Strike (Docket No. 45) is DENIED as moot.

The clerk is ordered to enter judgment for defendant on both counts of the complaint. Since defendant's counterclaim was voluntarily dismissed at the motion hearing on July 11, 2003, this case may now be closed.

It is So Ordered.

/s/ Michael A. Ponsor

MICHAEL A. PONSOR

U.S. District Judge

FILED
SEP 8 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-189

In the Supreme Court of the United States

JACOB M. ORNDORF,

Petitioner,

v.

PAUL REVERE LIFE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD C. VAN NOSTRAND
Counsel of Record

JOAN O. VORSTER
MIRICK, O'CONNELL, DEMALLIE
& LOUGEE, LLP
100 FRONT STREET
WORCESTER, MA 01608
(508) 791-8500

Counsel for Respondent
Paul Revere Life Insurance Company

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

Orndorf's formulation of the issues for review is misstated. The questions that are presented by this Petition, taking into account the facts and circumstances of this case, are more accurately stated as follows:

1. Did the First Circuit correctly determine that summary judgment on the record is an appropriate vehicle for deciding an ERISA benefits claim under the de novo standard of review?

2. Did the First Circuit correctly determine that when reviewing an ERISA benefits decision under the de novo standard of review, a claimant may not supplement the administrative record with medical records generated after the final administrative decision or take discovery where the claimant did not articulate good cause for the requested discovery?

3. Should this Court consider a settlement agreement involving the respondent, created long after the final administrative decision, and not presented to either the District Court or Court of Appeals, as reason to review this case?

STATEMENT REGARDING PARTIES

All parties to the proceeding are listed in the caption of the case.

STATEMENT PURSUANT TO RULE 29.6

The respondent, The Paul Revere Life Insurance Company, is a wholly owned subsidiary of The Paul Revere Corporation, which is a wholly owned subsidiary of UnumProvident Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT REGARDING PARTIES ii

STATEMENT PURSUANT TO RULE 29.6 iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

REASONS FOR DENYING PETITION 6

I. THE FIRST CIRCUIT'S DECISION IN *ORNDORF* DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *FIRESTONE* 6

II. THE FIRST CIRCUIT'S APPROACH TO ERISA DECISIONS SUBJECT TO DE NOVO REVIEW IS WIDELY FOLLOWED AMONG THE CIRCUITS 8

A. The Methods Employed Among The Circuit Courts of Appeal For Resolving ERISA Decisions Under De Novo Review Are Remarkably Similar 8

B. There Is No Discernable Conflict Between The Circuits As To The Availability Of Discovery Or Supplementing The Administrative Record Under De Novo Review 15

III. THERE IS NO REASON TO CONSIDER A SETTLEMENT AGREEMENT INVOLVING PAUL REVERE AS A BASIS FOR GRANTING CERTIORARI 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 21

Brown v. Seitz Foods,
140 F.3d 1198 (8th Cir. 1998) 19

Bunting v. Mellen, 541 U.S. 1019 (2004) 15

Casey v. Uddenholm, 32 F.3d 1094 (7th Cir. 1994) . . . 19

Duignan v. United States, 274 U.S. 195 (1927) 21

Firestone Tire and Rubber Company v. Bruch,
489 U.S. 101 (1989) 6, 7, 8, 17, 19

Gallager v. Reliance Standard Life Ins. Co.,
305 F.3d 264 (4th Cir. 2002) 9

Hall v. Unum Life Ins. Co.,
300 F.3d 1197 (10th Cir. 2002) 12

Herzberger v. Standard Ins. Co.,
205 F.3d 327 (7th Cir. 2000) 10, 17

Husty v. United States, 282 U.S. 694 (1931) 21

Kearney v. Standard Ins. Co.,
175 F.3d 1084 (9th Cir. 1999) 9, 10, 16, 18

Keszenheimer v. Reliance Standard Life Ins. Co.,
402 F.3d 504 (5th Cir. 2005) 9

Krizek v. Cigna Group Ins.,
345 F.3d 91 (2d Cir. 2003) 18

Lawn v. United States, 355 U.S. 339 (1958) 21

Luby v. Teamsters Health Welfare & Pen. Tr.,
944 F.2d 1176 (3d. Cir. 1991) 9, 19

Moon v. Am. Home Assur. Co.,
888 F.2d 86 (11th Cir. 1989) 17

Muller v. First Unum Life Ins. Co.,
341 F.3d 119 (2d. Cir. 2003) 9

Perry v. Simiplicity Eng'g,
900 F.2d 963 (6th Cir. 1990) 19

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) . . . 14

Quesinberry v. Life Ins. Co. of N. Am.,
987 F.2d 1017 (4th Cir. 1993) 19

Ray v. Unum Life Ins. Co. of Am.,
314 F.3d 482 (10th Cir. 2002) 11, 12, 16, 18

Shaw v. Connecticut Gen. Life Ins. Co.,
353 F.3d 1276 (11th Cir. 2003) 12, 13, 16, 17

Tacon v. Arizona, 410 U.S. 351 (1973) 21

Vega v. Nat'l Life Ins. Servs. Inc.,
188 F.3d 287 (5th Cir. 1999) 18-19

Wilkins v. Baptist Healthcare Sys., Inc.,
150 F.3d 609 (6th Cir. 1998) 9

Williams v. Bell S. Telecomm.,
373 F.3d 1132 (11th Cir. 2004) 9, 13

Statute

29 U.S.C. §1132(a)(1)(B) 6

STATEMENT OF THE CASE

By providing this Court with only a "factual skeleton" of the facts in his case, Orndorf glosses over important facts relevant to whether this case warrants review. Accordingly, Orndorf's statement of the case is incomplete because it does not mention the following undisputed facts:

In April 1995, while working as a perfusionist, Jacob Orndorf ("Orndorf") was hospitalized after a drug overdose. He submitted a claim for long-term disability benefits to The Paul Revere Life Insurance Company ("Paul Revere"), pursuant to the group long-term disability insurance policy Paul Revere issued to Orndorf's employer ("the Policy"). (A-9). Finding Orndorf was totally disabled under the Policy because his drug addiction made him unable to perform the duties of his occupation as a perfusionist, Paul Revere approved Orndorf's claim under the OTHER LIMITATIONS provision of the Policy, which provided a 60-month benefit for disabilities caused or contributed to by a psychiatric disorder or drug abuse. (A-9-10). Paul Revere paid the sixty months of benefits. (A-11).

However, faced with the eventual discontinuance of his disability benefits, three years after he submitted his 1995 disability claim, in June 1998, Orndorf notified Paul Revere his true disabling condition was not drug addiction, but lower back pain. (A-12). Paul Revere gathered medical records and conducted internal medical reviews to determine if Orndorf's new claim – back pain – made him unable to perform as a perfusionist. *Id.* The Administrative Record established Orndorf:

- complained of back pain more than a decade before submitting his 1995 drug-related disability claim (A-26);

- only received intermittent treatment for back pain prior to 1998 (A-27,28);

- worked as a perfusionist for years despite complaints of and treatment for back pain (A-36);

- stopped work as a perfusionist only because of his drug addiction (A-37);

- admitted prior to 1998 he had no physical disabilities that would preclude him from working as a perfusionist (A-31);

- expressed interest prior to 1998 in returning to work in occupations inconsistent with a back disability (A-31);

- continued to be physically active prior to 1998, which included taking long bike rides (A-33, 37);

- considered returning to work as a perfusionist prior to 1998 despite his intermittent back pain (A-31); and

- had not sustained any trauma to his back after 1995 that might have changed his long-standing back condition such that he could not work as a perfusionist.

Paul Revere concluded Orndorf's complaints of back pain did not totally disable him within the meaning of the Policy. (A-12-13).

Paul Revere provided Orndorf with two levels of appeal for his claim. (A-13-14). On appeal, Orndorf claimed he was disabled not only due to low back pain, but also neck pain, ankle pain, and hypertension. In support of his claim, Orndorf submitted a letter dated September 12, 2000 from a Dr. Gilbert, a treating physician. This letter is the alleged conflicting medical evidence that Orndorf claims Paul Revere, the district court, and the First Circuit failed to properly credit. In his one paragraph letter to Paul Revere Dr. Gilbert stated:

> Jacob Orndorf is a 45-year-old man disabled because of back pain. He first injured his back in 1976. Since then, he has seen a variety of specialists and has had a variety of treatment for progressive incapacitating back pain. At this time, he says that he cannot stand more than a few minutes, cannot sit for over half an hour and has to lie down several times during the day because of pain. MRI done in 1993 shows central and left-sided disc herniation with prominent degenerative changes at the L4-L5 level. He currently is 40% service-related for back pain and says that he is receiving Social Security disability. Because of this, I consider him disabled for sustained work.

(A-33-34).

Dr. Gilbert gave no explanation why Orndorf could work as a perfusionist until April 1995 despite a back injury dating back to 1976. He referenced one diagnostic test, the 1993 MRI, but failed to explain what the test results meant. *Id.*